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Municipal Zoning; Mandatory Referendum For Zoning Amendments; Lawful Delegation of Legislative Power; Due Process; City of Eastlake v. Forest City Enterprises, Inc.

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CONSTITUTIONAL LAW

Municipal Zoning • Mandatory Referendum For Zoning Amendments • Lawful Delegation of Legislative Power Due Process

City of Eastlake v. Forest City Enterprises, Inc.
96 S.Ct. 2358 (1976).

IN *City of Eastlake v. Forest City Enterprises, Inc.*,[1] the United States Supreme Court held that a mandatory referendum on all zoning changes did not violate the Due Process Clause of the United States Constitution. The Court decided that such referenda are not delegations of legislative power, but exercises of the people's reserved power. Therefore, they need not be accompanied by discernible standards as with delegations of power to administrative agencies.

In so holding, the Court reversed the Ohio Supreme Court,[2] which had held that the charter amendment adopted by the City of Eastlake allowed the public to exercise arbitrarily and unreasonably legislative power over zoning regulations. The absence of assurances that the electorate would act reasonably in accepting or rejecting zoning changes, the Ohio Court held, constituted the unlawful delegation of legislative power, and violated due process of law.

Pursuant to Article VIII, Section 3 of the Charter of the City of Eastlake then in effect, Forest City Enterprises, on May 18, 1971, petitioned the Planning Commission of Eastlake to rezone an eight-acre parcel of property zoned "light industrial" to multi-family, high rise apartment use. The Planning Commission approved Forest City's application, which was then submitted to City Council. On December 28, 1971, the Council amended the city's zoning ordinance as requested. Meanwhile, an amendment to Article VIII, Section 3 was circulated by initiative petition, and ultimately placed on the ballot. On November 2, 1971, the amendment was adopted by the Eastlake electorate.[3]

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[1] 96 S.Ct. 2358 (1976).

[2] Forest City Enterprises v. City of Eastlake, 41 Ohio St. 2d 187, 324 N.E.2d 740 (1975).

[3] The amendment provides in part:

> That any change to the existing land uses or any change whatsoever to any ordinance, or the enactment of any ordinance referring to other regulations controlling the development of land . . . cannot be approved unless and until it shall have been submitted to the Planning Commission for approval or disapproval. That in the event the city council should approve any of the preceding changes . . . it shall not be effective, but it shall be mandatory that the same be approved by a 55% favorable vote of all votes cast of

Forest City then applied, on April 6, 1972, for a parking and yard permit, preliminary to obtaining construction approval. The Planning Commission rejected the application since the necessary rezoning had not yet been submitted to and approved by 55 percent of the electorate as required by Article VIII, Section 3 as amended. In May, 1972, the voters of Eastlake failed to adopt the zoning amendment proposed by Forest City by the requisite 55 percent majority.[4]

Forest City filed a complaint in the Court of Common Pleas, seeking declaratory relief. The petition claimed that mandatory voter approval of all land use changes was unconstitutional by due process standards, and violated the referendum provisions of the Ohio Constitution.[5] Forest City also attacked the super-majority of 55 percent and the provision that the applicant bear all election costs.[6] The Court of Common Pleas upheld the constitutionality of the mandatory referendum and 55 percent requirements, but declared the cost provision unconstitutional. On appeal and cross-appeal the Eleventh District Court of Appeals affirmed.[7] The Supreme Court of Ohio granted certiorari and reversed.[8]

The Ohio Court held that insofar as the charter provision purported to apply to administrative actions (*e.g.*, granting variances and special use permits), the referendum power could not be invoked.[9] However, amendments to the zoning ordinance were characterized as legislative enactments. Such amendments would be properly subject to referendum unless the Eastlake provision was violative of due process independently.[10] The court deter-

> the qualified electors of the City of Eastlake at the next regular municipal election .... Said issue shall be submitted to the electors of the City only after approval of a change of an existing land use by the Council for an applicant ....

[4] The facts are fully set out in 96 S.Ct. at 2360-61; 41 Ohio St. 2d at 187-88, 324 N.E.2d at 742.

[5] OHIO CONST. art. II, §§1,1(f); art. XVIII, §3 (Page 1955).

[6] The Court of Common Pleas upheld the requirement of a 55 percent majority; this issue was not separately addressed in the appellate courts. The determination of the invalidity of the provision requiring the applicant to bear all costs was affirmed by the Court of Appeals and was not cross-appealed to the Ohio Supreme Court. 41 Ohio St. 2d at 189, 324 N.E.2d at 742.

[7] Forest City Enterprises v. City of Eastlake, No. 73AP-263 (Ohio Ct. App. Lake County, July 23, 1973).

[8] 41 Ohio St. 2d 187, 324 N.E.2d 740 (1975).

[9] *Id.* at 190, 324 N.E.2d at 743.

[10] *Id.* at 189, 324 N.E.2d at 743. Referendum is properly invoked in relation to legislative enactments. OHIO CONST. art. II, §§1, 1(f). As such, its use to validate or invalidate a legislative amendment would comport with due process. The standard of judicial review of the referendum would be the same as that for statutes. The statute would be invalid if "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926). Thus, the Ohio Supreme Court sought to establish due process violations as inherent in the operation and possible effect of the Eastlake mandatory referendum provisions, finding those provisions unconstitutionally arbitrary. 41 Ohio St. 2d at 191, 324 N.E.2d at 746.

mined that a reasonable use of property, approved by legislative action, could not be made dependent upon the potentially arbitrary whims of the voting public.[11] Referendum, proper for community-wide policy making, was deemed improper for zoning changes, which usually involve relief of individual hardship.[12] In a concurring opinion, written by Justice Stern, a majority of four justices found the Eastlake charter amendment to be violative of equal protection, as a tool for exclusionary zoning under the guise of popular democracy.[13] The United States Supreme Court granted certiorari[14] and in a 6-3 decision upheld the constitutionality of the referendum and remanded to the Ohio Supreme Court.[15]

The opinion of the United States Supreme Court, written by Chief Justice Burger, is a frontal attack on the reasoning used by the Ohio Supreme Court to support its finding of lack of due process. Unfortunately, the Ohio Court's opinion is faultily constructed. The Ohio Court accepted the proposition that rezoning a single parcel by amendment is legislative action, but then equated referendum, involving the entire electorate, with localized consent requirements to establish due process violations.[16] The Ohio Court then concluded that the lack of standards for the exercise of a referendum permitted the arbitrary exercise of the police power, and thus invalidated the electors' ability to constitutionally exercise their legislative responsibility.[17]

The United States Supreme Court first examined the status of referendum in Ohio, and concluded that by express constitutional provision the people in municipalities reserved the power of referendum "on all questions which such municipalities may now or hereafter be authorized by law to control by legislative action."[18] Therefore, the characterization of the referendum power as a "delegation" of legislative authority was inherently inconsistent. Rather, referendum is a means of direct political participation through

[11] 41 Ohio St. 2d at 195, 324 N.E.2d at 746.

[12] *Id.* at 197, 324 N.E.2d at 747.

[13] *Id.* at 198, 324 N.E.2d at 748 (Stern, J., concurring).

[14] 96 S.Ct. 185 (1975).

[15] On remand, the Ohio Supreme Court accepted the reasoning of the United States Supreme Court, perceiving "no state due process constitutional questions which, under this record, we would choose to decide in a manner other than mandated by the opinion on remand." Forest City Enterprises, Inc. v. City of Eastlake, 48 Ohio St. 2d 47, 48, 356 N.E.2d 499, 500 (1976).

[16] The court relied on the authority of Washington *ex rel.* Seattle Title Trust Co. v. Roberge, 278 U.S. 116 (1928) and Eubank v. Richmond, 226 U.S. 137 (1912). In both cases, an ordinance allowing neighbors within a specified distance to set restrictions on reasonable uses within the area was held to be a standardless delegation impinging upon a property owner's freedom to use his property subject only to rational legislative regulation.

[17] 41 Ohio St. at 196, 324 N.E.2d at 746. For more detailed analyses of the weakness of the court's reasoning, see 9 AKRON L. REV. 175 (1975); Comment, *Forest City Enterprises, Inc. v. City of Eastlake: Zoning Referenda and Exclusionary Zoning,* 24 CLEV. ST. L. REV. 635 (1975).

[18] 96 S.Ct. at 2362, *citing* OHIO CONST. art. II, §1(f).

which the people make final decisions regarding enactments of their representative bodies on questions of public policy.[19]

After characterizing the referendum as *reserved* power, the Court readily accepted the Ohio Supreme Court's finding that the power to rezone is distinguishable from the power to grant relief from unnecessary hardship, the former being legislative and the latter administrative.[20] Deferring to this "binding interpretation of state law,"[21] the Court found it unnecessary to examine the accuracy or efficacy of such a categorization of zoning processes, merely citing supportive decisions of other states.[22] Nonetheless, this determination is crucial to a finding that a referendum is not an unlawful delegation.

Referendum is a reserved power to be exercised only upon *legislative* action. The United States Supreme Court deftly avoided the controversy over the nature of zoning amendments as legislative[23] or administrative[24] when applied to individual property. In determining that the power of mandatory referendum is not an unconstitutional delegation, the Court supported itself with legal sophistry rather than with penetrating analysis of the issues and facts involved.[25]

The Court considered the validity of the Ohio Court's argument that the lack of standards to guide the voters would subject legislative action to the capricious whims of the public, resulting in denial of due process. In answering this allegation, the Court distinguished delegation of power to regulatory bodies, which requires guidelines,[26] from the exercise of reserved power inhering in the electorate. The latter power is regulated by the courts as a legislative function, and is held to a standard of bearing a reasonable relationship to the rational exercise of the police power in furtherance of the

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[19] 96 S.Ct. at 2361-62.

[20] *See* Mobil Oil Corp. v. Rocky River, 38 Ohio St. 2d 23, 309 N.E.2d 900 (1974); Donnelly v. Fairview Park, 13 Ohio St. 2d 1, 233 N.E.2d 500 (1968); Berg v. Struthers, 176 Ohio St. 146, 198 N.E.2d 48 (1964); Hilltop Realty Inc. v. South Euclid, 110 Ohio App. 535, 164 N.E.2d 180 (1960); *Cf.* Myers v. Schiering, 27 Ohio St. 2d 11, 271 N.E.2d 864 (1971).

[21] 96 S.Ct. at 2362 n.9.

[22] *E.g.,* Smith v. Township of Livingston, 106 N.J. Super. 444, 256 A.2d 85 (Ch. 1969).

[23] Johnston v. Claremont, 49 Cal. 2d 826, 323 P.2d 71 (1958); Dwyer v. City Council, 200 Cal. 505, 253 P. 932 (1927); Denny v. Duluth, 295 Minn. 22, 202 N.W.2d 892 (1972). *Compare* Coral Gables v. Carmichael, 256 So.2d 404 (Fla. Ct. App. 1972), *with* Andover Dev. Corp. v. New Smyrna Beach, 328 So.2d 231 (Fla. Ct. App. 1976).

[24] Snyder v. Lakewood, 542 P.2d 371 (Colo. 1975); Fassano v. Board of County Comm'rs 264 Or. 574, 507 P.2d 23 (1973); Bird v. Sorenson, 16 Utah 2d 1, 394 P.2d 808 (1964); Fleming v. Tacoma, 81 Wash. 2d 292, 502 P.2d 327 (1972). *Compare* Kelley v. John, 162 Neb. 319, 75 N.W.2d 713 (1956), *with* Frank v. Scottsbluff, 183 Neb. 722, 164 N.W.2d 215 (1969).

[25] *See* discussion accompanying notes 66-83 *infra.*

[26] 96 S.Ct. at 2363, *citing* Yakus v. United States, 321 U.S. 414 (1944).

public health, safety and welfare.[27] The Eastlake charter contemplated referring zoning changes to a vote of *all* the electorate. Thus, the Court easily distinguished the decisions invalidating consent provisions restricted to the immediate neighbors,[28] since referendum involves community-wide decision-making. The Court deemed that *James v. Valtierra,*[29] upholding mandatory referenda on public housing, was controlling.[30] The Ohio Court's proffered distinction of *James v. Valtierra* as dealing with expenditure of municipal funds in a federal program rather than with rezoning questions[31] was ignored by Chief Justice Burger.

However, the significance of Justice Paul Brown's supportive reasoning in the Ohio decision should not be overlooked. The Ohio Court denied that most rezoning affects the entire community in such a way as to make its referability justified as community-wide policy-making. This denial was a major step toward delineating rezoning in such cases as an administrative action.[32] The Court compared legislation prescribing *mandatory* referenda for counties and townships adopting *comprehensive* zoning resolutions[33] with legislation allowing referenda only upon petition for subsequent amendments.[34] These provisions evidence the legislative determination that amend-

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[27] *See, e.g.,* Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

[28] *See* cases cited note 16 *supra.*

[29] 402 U.S. 137 (1971).

[30] 96 S.Ct. at 2364.

[31] 41 Ohio St. 2d at 197, 324 N.E.2d at 747.

[32] *See* cases cited note 24 *supra.* The Ohio Court had stated earlier in its opinion: "Grants of relief from unnecessary hardship . . . are classified as administrative acts, regardless of the label placed upon them." 41 Ohio St. 2d at 190, 324 N.E.2d at 743.

[33] OHIO REV. CODE ANN. §303.11 (Page 1953) reads in pertinent part:

> If the [comprehensive] zoning resolution is adopted by the board of county commissioners, such board shall cause the question of whether or not the proposed plan of zoning shall be put into effect to be submitted to the electors residing in the unincorporated area . . . included in the proposed plan of zoning for their approval or rejection . . . . No zoning regulations shall be put into effect . . . unless a majority of the vote cast on the issue in that township is in favor of the proposed plan of zoning.

OHIO REV. CODE ANN. §519.11 (Page 1953) applies to township trustees.

[34] OHIO REV. CODE ANN. §§303.12, 519.12 (Supp. 1975) read in pertinent part:

> Amendments or supplements to the zoning resolution . . . shall [be] set . . . for a public hearing thereon . . . . If the proposed amendment or supplement intends to re-zone or re-district ten or less parcels of land . . . written notice of the hearing shall be mailed . . . to all owners of property within and contiguous to . . . such area . . . The planning commission shall recommend the approval or denial . . . . or modification . . . to the zoning commission . . . . The . . . zoning commission shall . . . submit its recommendation . . . to the board of township trustees.
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> The board [shall] . . . set a time for a public hearing . . . . Such amendment or supplement adopted by the board shall become effective in thirty days after the date of such adoption unless within thirty days . . . a petition, signed by a number of qualified voters . . . [is filed] requesting the board to submit the amendment or supplement to the electors of such area, for approval or rejection . . . . No amendment . . . for which such referendum vote has been requested shall be put into effect unless a majority of the vote cast on the issue is in favor of the amendment.

ments infrequently involve decisions of community-wide policy import. Therefore, when the Ohio Supreme Court determined that such evidence supported the rejection of mandatory referenda on all zoning changes, it could well be held to have decided that the Eastlake provisions were in conflict with the general law of Ohio[35] in delineating the scope of reserved power.[36]

The United States Supreme Court, however, was content to deal only with the concrete conclusions as to the legislative characterization of rezoning and the applicability of referenda to legislative actions. It failed to examine many of the Ohio Court's inconsistent statements[37] for guidance in reaching an understanding of the position of the Ohio Court in regard to Ohio law.

The dissents of Justices Powell and Stevens, on the other hand, dealt with the result-oriented approach of the Ohio Court's concurrence in *Eastlake,* by questioning the purpose and effect of the Eastlake charter amendment.[38] Without elaboration, Justice Powell distinguished generally applicable legislation subject to referenda from legislation affecting only particular property. He concluded that the latter should not be subject to

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[35] In Ohio *ex rel.* Davis v. Hildebrandt, 241 U.S. 565 (1916), the Supreme Court deferred to the state interpretation of the scope and validity of its referendum provision in regard to Congressional districting, finding that the state Constitution and laws made referendum part of the legislative power. In like manner, it could be argued that the state of Ohio had the prerogative to determine that the legislative power reserved to the people did not extend to mandatory direct vote on each aspect of a possibly minor change to a comprehensive enactment.

[36] Admittedly, as a home rule municipality, Eastlake was free to establish its own referendum procedures under OHIO CONST. art. II, §1(f). However, when the Ohio General Assembly promulgated laws for unincorporated townships and counties, it determined that mandatory referendum on zoning amendments was unnecessary and perhaps an improper use of the referendum power. *See* OHIO REV. CODE ANN. §§303.11, 303.12, 519.11, 519.12; notes 33-34 *supra.* The Ohio Court, in citing to these non-controlling provisions, evidenced a judicial determination that such regulation was constitutionally mandated as well. When individual changes without community-wide repercussions are made, mandatory referendum is an unauthorized delegation since procedural due process must be assured as for administrative decisions. 41 Ohio St. 2d at 197-98, 324 N.E.2d at 749. The United States Supreme Court, in deciding *Eastlake,* did not take into account this distinction.

[37] The Ohio Court determined that actions should be classified on the basis of substance as individual adjudications, rather than on the form of their nomenclature. 41 Ohio St. 2d at 190, 324 N.E.2d at 743. Then the court stated that its decision dealt simply with the constitutionality of mandatory referendum on legislative actions in zoning. *Id.* Finally, the court stated in relation to zoning amendments:

> It can scarcely be contended that every proposed land use change, no matter how small, ... either involves or allows community-wide policy-making. Rather, most involve hardships affecting individual parcels or property .... Amendments to rural zoning ordinances ... are not subject to mandatory voter approval, but rather to permissive referendum elections, when a substantial number of resident voters feel sufficiently aggrieved to circulate the appropriate petitions ... Such provision contrasts sharply with the Eastlake charter, and thus is free from the deficiencies implicit in an unlawful delegation of the legislative power. 41 Ohio St. 2d at 197-98, 324 N.E.2d at 747.

[38] 96 S.Ct. at 2365 (Powell & Stevens, JJ., dissenting).

referendum because the electorate cannot accord a full hearing to the affected person to insure fundamental fairness. The disturbing result of allowing local governments to tread on individual rights through referendum, bypassing normal protections, is an issue worthy of more discussion and analysis.[39]

Rather than accepting the bald assertion that zoning amendments are legislative acts, Justice Stevens pointed out the fundamental differences in zoning enactments and general police power regulations. Zoning plans customarily and necessarily provide for changes based on individual relief,[40] primarily to ensure the constitutionality of the entire zoning scheme.[41] The difference between the enactment of comprehensive ordinances and the granting of specific relief by amendment is a major premise of zoning law.[42] That difference needs to be considered when characterizing council actions as legislative or functionally administrative.[43] If the process deals essentially with adjudication between individual rights in a parcel of property and the regulations imposed by a comprehensive zoning code, minimal standards of due process should be adhered to, since a major aspect of due process is the procedural balancing of individual versus community rights.[44]

Justice Stevens recommended deference to findings by a state court that a particular procedure is an unreasonable method for handling local problems.[45] The fact that the individual is not protected when conflicting policy issues are presented necessitates that a responsible organ of government, subject to due process standards, be the arbiter. When the purpose or effect of the contested law is to provide a tool for excluding low and middle income families, or merely for making zoning changes burdensome to the individual seeking them, the conflict of individual rights with the majority consensus is manifest. Such conflict requires solution only after fair proced-

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[39] *See* text accompanying notes 47-64 *infra.*

[40] 96 S.Ct. at 2365-66. *See also* Louisville v. Kavanaugh, 495 S.W.2d 502 (Ky. 1973); Kropf v. Sterling Heights, 391 Mich. 139, 215 N.W.2d 179 (1974); Cheney v. Village 2 at New Hope, Inc., 429 Pa. 626, 241 A.2d 81 (1968).

[41] 96 S.Ct. at 2366. *See also* Mobil Oil Corp. v. Rocky River, 38 Ohio St. 2d 23, 309 N.E.2d 900 (1974).

[42] 1 ANDERSON, AMERICAN LAW OF ZONING, §5.02 (1968); 1 RATHKOPF, THE LAW OF ZONING AND PLANNING, Ch. 12, §§1, 2, 5, 6 (4th ed. 1975).

[43] *See* cases cited notes 23-24 *supra.*

[44] In C. Miller Chevrolet, Inc. v. Willoughby Hills, 38 Ohio St. 2d 298, 303, 313 N.E.2d 400, 404 (1974), the court stated:

> In each case [determining the validity of denying a variance] there must be a balancing of interests between the benefits that would flow to the owner of the property if his proposed use were allowed and the benefits to the public health, safety, welfare and morals that are derived from the existing zoning.

See also Appeal of Bd. of Adjustment, 419 Pa. 504, 215 A.2d 597 (1965), which advocates that judicial review of denied changes in zoning ordinances be undertaken when property owner versus the community interest in the status quo might be in issue.

[45] 96 S.Ct. at 2368.

ures have been followed. A determination of lack of due process must rest upon factual considerations. A state court's knowledge of conditions within the state relative to land use and zoning is a sound basis for weighing the fairness of the effect of a particular law. Mandatory referendum creates such an obstacle to effecting change of limited or individual impact that fundamental fairness can indeed be found lacking. Here, in Stevens' view, the Ohio Court's determination that mandatory referendum deprives individuals of fundamental fairness should be sustained.[46]

The impact of the United States Supreme Court's decision in *Eastlake* may be overwhelming or minimal. The opinion, in accepting state characterization of rezoning as legislative, would appear to be inapplicable in states which have held the rezoning of a parcel to be an administrative action. Inferentially, if the action is administrative, referendum is inapplicable,[47] and due process standards must be adhered to, subject to judicial review. However, for those states which have not classified rezoning as administrative, the judicial abdication apparent in the United States Supreme Court decision might reinforce the majority position that zoning enactments, as legislative, are to be upheld if their rationality is "fairly debatable."[48]

If that should happen, the uses to which the zoning power may be put to restrict both individual property and personal rights may continue despite the inroads against exclusionary zoning made by state courts which have considered the problem and its effects in depth.[49] Respondent's brief named over a dozen communities ringing the Cleveland metropolitan area which have enacted provisions for mandatory referendum on all zoning changes.[50] The United States Supreme Court, in validating such provisions, has enabled a major exclusionary tool to be used with impunity to halt the expected urban-suburban growth patterns of this area,[51] and perhaps many others.

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[46] *Id.* at 2371. *Cf.* Reitman v. Mulkey, 387 U.S. 369, 378 (1967), wherein the Court deferred to the California Court's determination that Article I, §26 of the state's constitution was discriminatory based on "the knowledge of the facts and circumstances concerning... the potential impact of §26, and... the milieu in which that provision would operate."

[47] *See, e.g.*, West v. Portage, 392 Mich. 458, 221 N.W.2d 303 (1974); Bird v. Sorenson, 16 Utah 2d 1, 394 P.2d 808 (1964).

[48] Village of Belle Terre v. Boraas, 416 U.S. 1, 5 (1974). *See also* Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); DeCaro v. Washington Township, 344 A.2d 725 (Pa. Commw. 1975); Board of County Supervisors v. Carper, 200 Va. 653, 107 S.E.2d 390 (1959).

[49] *See, e.g.*, De Simone v. Greater Englewood Housing Corp. No. 1, 56 N.J. 428, 267 A.2d 31 (1970) (finding legal arguments against low income housing to be motivated by exclusionary interests); Southern Burlington County NAACP v. Mount Laurel, 119 N.J. Super 164, 290 A.2d 465 (1972), *aff'd*, 67 N.J. 151, 336 A.2d 713 (1975); Concord Township Appeal, 439 Pa. 466, 268 A.2d 765 (1970).

[50] 41 Ohio St. 2d at 201, 324 N.E.2d at 749 (Stern, J., concurring).

[51] *Id.*:

> The inevitable effect of such provisions for mandatory referendum is to perpetuate the *de facto* divisions in our society between black and white, rich and poor.... The exer-

Nevertheless, in light of the reasoning adopted by the Court, the practitioner may be able to distinguish away the precedential value of the decision by advancing an argument based upon the policy and effect of zoning legislation. The necessity of comprehensive planning and the utility of amendments as administrative relief within a zoning plan should be emphasized. The Court, in failing to come to grips with the effect of the mandatory referendum on the people themselves, failed to address both a major legal and social issue. Initially, the purpose and effect of referendum must be examined to determine if it can be legitimately applied to rezoning by amendment. Then, the character of zoning legislation itself and the import of amendments dealing with particular parcels of real estate need to be analyzed.

The referendum power is a tool by which the people can rescind an act of their representative assembly by voting upon legislation themselves.[52] Referendum, however, cannot be used to deny constitutionally protected rights.[53] The use of referendum, by its very nature, makes enactments or ordinances "substantially more difficult to secure,"[54] and tends to retain "the *status quo* existing prior to legislative adoption of the amendatory zoning ordinance."[55] The danger that referendum will be used to impose the majority interest against a valid minority interest[56] necessitates some regulation of the power. The procedural requirements statutorily created are measures designated to effectuate this protection.[57] "The interest protected . . . is the right of the majority to have the legislation enacted by their elected representatives to take effect."[58]

In addition to these considerations, the Ohio referendum provision contained in Article II, Section 1(d) of the Ohio Constitution expressly exempts

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cise of the police power through zoning cannot be permitted where its sole purpose is to tighten the [exclusionary] noose.

[52] *See* Olson, *Limitations and Litigation Approaches: The Local Power of Referendum in Federal and State Courts—A Michigan Model*, 50 J. URBAN L. 209 (1972).

[53] Lucas v. 44th General Assembly, 377 U.S. 713 (1964).

[54] Hunter v. Erickson, 393 U.S. 385, 390 (1969).

[55] West v. Portage, 392 Mich. 458, 476, 221 N.W.2d 303, 312 (1974) (Williams, J., concurring in part).

[56] "Wherever the real power in a government lies, there is the danger of oppression. In our Governments the real power lies in the majority of the Community, and the invasion of private right is chiefly to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the constituents . . . ." 5 WRITINGS OF JAMES MADISON 272 (Hunt ed. 1904), *quoted in* Reitman v. Mulkey, 387 U.S. 369, 387 (1967) (Douglas, J., concurring).

[57] OHIO CONST. art. II, §1(g); OHIO REV. CODE ANN. §§303.01 *et seq.*, 519.01 *et seq.* (Page 1953).

[58] Note, *Township Zoning Referenda; Sufficiency of Contents of Petition*, 33 OHIO ST. L.J. 144, 147 (1972). *See also* Kancler, *Litigating the Zoning Case in Ohio: Suggestions to Fill in the Textbook Void*, 24 CLEV. ST. L. REV. 33, 40 (1975): "Automatic referenda of all zoning decisions seems obviously inconsistent with the concept of representative government."

emergency legislation, laws providing for tax levies, and appropriations for current expenses[59] from its operation. The Ohio Supreme Court has held that the referendum should not be used if its effect will be burdensome despite constitutional protections. In *Shryock v. Zanesville*,[60] the court cited the types of laws that would not be subject to referendum under the Constitution. Further elaborating, the *Shryock* Court determined that "the test for exempting a law from referendum should be whether the law is similar in 'character' to the exemption contained in Section 1(d) of Article II."[61] It can be argued that such measures as tax levies and appropriations necessary for conducting the business of the municipality are analogous to zoning amendments necessary for the proper development of the comprehensive plan.[62] Each is operational in nature and necessary to specific implementation of municipal policies. Submitting zoning changes automatically to the electorate can cause lack of uniformity in the implementation of comprehensive land use planning through zoning.[63] "If each change in a zoning classification were to be submitted to a vote of the city electors, any master plan would be rendered inoperative."[64] Standardless and uninformed acceptance or rejection of zoning amendments, which are often necessary to meet fluctuating conditions inherent in growth, can result in arbitrary application of zoning regulations to individuals.[65]

After establishing that referendum may be arbitrarily applied, especially when zoning considerations are paramount, it is necessary to characterize the proper use of zoning legislation and amendments. Zoning affects the uses to which an individual's property may be put; it is therefore subject to the general requirement that it be in accord with a comprehensive plan.[66] The

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[59] OHIO CONST. art. II, § 1(d) states: "Laws providing for tax levies, appropriation for the current expenses of the state government . . ., and emergency laws . . . shall not be subject to referendum." This provision does not apply to municipalities.

[60] 92 Ohio St. 375, 110 N.E. 937 (1915).

[61] State *ex rel.* Bramblette v. Yordy, 24 Ohio St. 2d 147, 151, 265 N.E.2d 273, 275 (1970).

[62] In San Diego Bldg. Contractors Ass'n v. City Council, 13 Cal. 3d 205, 529 P.2d 570, 118 Cal. Rptr. 146 (1974) the court compared zoning legislation with property tax rates.

[63] *See* Forman v. Eagle Thrifty Drugs & Markets, Inc., 89 Nev. 533, 516 P.2d 1234 (1973), where an ordinance approved in a referendum was invalidated by a broader initiative amendment to the zoning code in the same election.

[64] Bird v. Sorenson, 16 Utah 2d 1, 2, 394 P.2d 808 (1964) (holding that therefore zoning amendments can only be rationally classified as administrative actions.)

[65] 96 S.Ct. at 2365 (Stevens, J., dissenting):

> As land continues to become more scarce, and as land use planning constantly becomes more sophisticated, the needs and opportunities for unforeseen uses of specific parcels of real estate continually increase. For that reason, no matter how comprehensive a zoning plan may be, it regularly contains some mechanism for granting variances, amendments, or exemptions for specific uses of specific pieces of property.

[66] *See* Standard State Zoning Enabling Act (1926). Eastlake Code §1165.02 provides that Council may change zoning if in compliance with the Master Plan or good zoning practice. *Cf.* Cassell v. Lexington Township Bd. of Zoning Appeals, 163 Ohio St. 340, 127 N.E.2d 11

danger of allowing the populace to rule on all changes is that a comprehensive plan will be compromised.[67] The amendments may violate the general purpose of the municipal policy of zoning. It is the province of the courts to guard against the tendency to expand the purpose of referenda, and "to confine this important reserved right of the people to its legitimate and proper scope, lest, through misuse, it fall into disrepute."[68] The use of mandatory referenda to halt the necessary growth of communities with exclusionary effect can certainly cause it to fall into disrepute.[69] The whims of the voting public or the majority of the community cannot be bowed to in pursuance of a comprehensive zoning plan, and cannot justify the grant or denial of a variance or amendment relating to a specific property.[70] "[C]onstitutional law is not a matter of majority vote . . . . [t]he Fourteenth Amendment teaches that it is personal rights which are to be protected against the will of the majority."[71]

Comprehensive plans reflect the major policy of communities in relation to zoning. Reasonable flexibility and responsiveness to changing condi-

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(1955), which interprets the present Section 519.02 of the Ohio Revised Code (the township zoning enabling provision) to require any and all actions of the township purporting to be under it to be in accord with a comprehensive plan:

> The absence of any comprehensive plan in the regulation involved herein certainly opens the door to an arbitrary and unreasonable administration of the regulation . . . There being no yardstick in the regulation by which the zoning commission could possibly be guided, we can come to no conclusion other than that the commission . . . acted arbitrarily and unreasonably. . . .

The fact that standards in administration, assuring rational decisions based on comprehensive planning, are lacking makes mandatory referendum subject to the same arguments. *Id.* at 345 127 N.E.2d at 14.

[67] Smith v. Township of Livingston, 106 N.J. Super. 444, 256 A.2d 85 (Ch. 1969).

[68] West v. Portage, 392 Mich 458, 466, 221 N.W.2d 303, 307 (1974). *Accord,* Fasano v. Board of County Comm'rs, 264 Or. 574, 581, 507 P.2d 23, 26 (1973) ("A determination whether the permissible use of a specific piece of property should be changed is usually an exercise of judicial authority."); Fleming v. Tacoma, 81 Wash. 2d. 292, 295, 502 P.2d 327, 330-31 (1972):

> [Z]oning amendments . . . are sufficiently distinguishable from other legislative functions to allow administrative standards to be applied to them. . . . In amending a zoning code . . . [the municipal legislative body] in effect, makes an adjudication between the rights sought by the proponents and those claimed by the opponents of the zoning change.

[69] *Cf.* Hunter v. Erickson, 393 U.S. 385 (1969); Kelley v. John, 112 Neb. 319, 75 N.W.2d 713:

> The administration of the ordinance . . . very rarely affects all the electors of a municipality. . . . The uniformity required in the proper administration of a zoning ordinance could be wholly destroyed by referendum. A single decision by the electors . . . [could destroy zoning if] in conflict with the general scheme. . . . *Id.* at 323, 75 N.W.2d at 716.

[70] "[I]n restricting individual rights by exercise of the police power, . . . a municipal corporation . . . can not deprive an individual of property rights by a plebiscite. . . . Such action is beyond the delegated power . . . to pass reasonable ordinances." Benner v. Tribbit, 190 Md. 6, 20, 57 A.2d 346, 353 (1948). *See also* Homecroft v. Macbeth, 238 Ind. 57, 148 N.E.2d 563 (1958); Udell v. Haas, 21 N.Y.2d 463, 235 N.E.2d 897, 288 N.Y.S.2d 888 (1968); Kent v. Zoning Board of Review, 74 R.I. 89, 58 A.2d 623 (1948).

[71] Lisco v. Love, 219 F. Supp. 922, 944 (D. Colo. 1963) (Doyle, J., dissenting).

tions in the plan are necessary if the policy is to have its desired effect on the future growth and development of the municipality. The council must logically develop its plan.[72] Congress has recognized that comprehensive planning must be a cooperative effort of professionals, who can assure that planning is an on-going process with strategies for implementation and evaluation of goals achieved.[73] Ohio has also embraced the view that zoning should advance the general public interest in land use planning through plans based upon analysis of existing land uses and reasonably forseeable needs based upon such considerations as population, economics, living, and transportation problems.[74]

The American Law Institute Model Land Development Code requires that local governments plan in a "socially and economically desirable manner" in accord with "a system of uniform statewide procedural standards."[75] The Code emphasizes long-term planning policies to be effectuated by short-term goals which are expected to change with conditions.[76]

Rational planning is the basis for the constitutional validity of zoning. Providing for amendment by submission to the general population, uninformed of the multitude of variables necessary to continue rational land use, is destructive of the entire purpose behind zoning. For this reason, state courts are increasingly finding the amendment process when applied to a particular property to be administrative in nature and subject to judical review.[77] The courts insist that the actions of the local council, which can be administrative as well as legislative,[78] be categorized on the basis of *substance* rather than *form*.[79] When the council, by charter, ordinance, or statute, is determining a matter after public hearing and/or determination of suitability by the planning commission,[80] the adjudicatory nature of the process is manifest, and due process must be maintained.[81]

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[72] Jablon v. Town Planning and Zoning Commission, 157 Conn. 434, 254 A.2d 914 (1969); Bedford v. Village of Mt. Kisco, 33 N.Y.2d 178, 306 N.E.2d 155, 351 N.Y.S.2d 129 (1973).

[73] 40 U.S.C. § 461 (a), (b), (c) (Supp. V, 1975).

[74] OHIO REV. CODE ANN. § 122.06 (Page Supp. 1976); Grant v. Washington Twp., 1 Ohio App.2d 84, 203 N.E.2d 859 (1963).

[75] ALI, MODEL LAND DEV. CODE art. 1, § 1-101 (Proposed Official Draft 1975).

[76] *Id.*, art. 3, § 3-105 and Commentary at 126-40.

[77] *See* cases cited note 24 *supra*. *Cf. ALI*, MODEL LAND DEV. CODE art. 2, § 2-312 (Proposed Official Draft 1975), which subjects amendments limited in effect to one parcel or less than 50 acres to criteria developed for administrative hearings, such as findings and conclusions based upon the record. The accompanying note explains that the purpose is to provide for judicial review and scrutiny of land use decisions, dispensing with "automatic" validity.

[78] Charter of the City of Eastlake, Art. V, § 10.

[79] West v. Portage, 392 Mich. 458, 221 N.W.2d 303 (1974); Fasano v. Board of County Comm'rs, 264 Or. 574, 507 P.2d 23 (1973). *Cf.* quotation in note 32 *supra*.

[80] *See* Charter of the City of Eastlake, Art. VIII, § 3.

[81] *See* Hurst v. Burlingame, 207 Cal. 134, 277 P. 308 (1929). *Cf.* Driscoll v. Austintown

Since the decision-making process must be sensitive to individual rights, since the amendment is merely applicable locally, and since the rezoning is an application of the general policy of the comprehensive zoning ordinance to a particular piece of property, the action is administrative rather than legislative.[82] If the body passing upon the amendment (applying the zoning ordinance to the particular property) is legislative and its acts are treated as such without reference to their nature or effect, basic constitutional protections could be circumvented by delineating any quasi-judicial function as legislative in order to escape meaningful judicial scrutiny.[83]

CONCLUSION

The fallacy of terming actions which balance individual rights with the community interest in zoning regulations as legislative, thereby subject to referendum and not subject to judicial scrutiny, is clear. Zoning legislation differs significantly in function and administration from other laws. The need for amendment to relieve individual hardship or incorporate timely changes into the comprehensive land use plan is essential to the zoning process. To obstruct change by use of mandatory referendum undercuts the judicially accepted rationale of zoning flexibility for continuing rational land use. To subject individual adjudication to majority interests negates the constitutional safeguards which courts have engrafted on the zoning process, and institutionalizes status quo land use and arbitrary change in development patterns.

The flaws in legal reasoning incorporated in the Ohio Supreme Court's decision in *Eastlake* provided the United States Supreme Court with the opportunity to reverse that decision by citing propositions of law contrary to the Ohio Court's position. In so doing, the United States Supreme Court failed to deal with the paramount underlying issues of the proper categoriza-

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Associates, 42 Ohio St. 2d 263, 328 N.E.2d 395 (1975), which, while treating rezoning as legislative, also cites to OHIO REV. CODE ANN. § 519.12 (requiring notice and hearing if less than 10 parcels are affected). Since legislative acts need not conform to such due process standards, the treatment of rezoning as subject to such due process safeguards implies that the action is administrative and quasi-judicial in nature. *See also* Cook-Johnson Realty Co. v. Bertolini, 15 Ohio St. 2d 195, 239 N.E.2d 80 (1968) (Schnieder, J. dissenting); R. BABCOCK, THE ZONING GAME 158 (1966).

[82] Woodlawn Area Citizen's Ass'n. v. Board of County Comm'rs, 241 Md. 187, 216 A.2d 149 (1966); Fleming v. Tacoma, 81 Wash. 2d 292, 502 P.2d 327 (1972). Specially concurring in Ward v. Village of Skokie, 26 Ill. 2d 415, 424, 186 N.E.2d 529, 533 (1962), Justice Klingbiel stated:

> If [a body] is acting in a legislative capacity it has no business deciding particular cases at all. . . . Such activities are not legislative but administrative, quasi-judicial, or judicial in character. To place them in the hands of legislative bodies, whose acts are not judicially reviewable, is to open the door completely to arbitrary government. . . . It is because of this immunity from review that legislative bodies must confine themselves to the prescribing of general rules.

[83] 26 Ill. 2d 415, 425, 186 N.E.2d 529, 534 (1962).

tion of actions under zoning regulations and the proper use of referendum. The lack of analysis of the effect of the provisions of the Eastlake charter on the people is a significant defect in the decision.

Laws, including zoning regulations, should be enacted for the general welfare and be applied fairly to the people they are promulgated to serve. Laws which allow arbitrary results and impede the accomodation of growth threaten the democratic process more severely than does the elimination of mandatory referenda which may achieve an exclusionary or illegitimate goal. In determining the constitutional validity of a law, its purpose and effect on society should be analyzed. Adherence to legal principles in a vacuum is meaningless.

ELIZABETH REILLY

CONSTITUTIONAL LAW

Civil Rights Act • Section 1981 • Title VII • Reverse Discrimination • Equal Protection

McDonald v. Santa Fe Trail Transp. Co., 96 S.Ct. 2574 (1976)

THE UNITED STATES SUPREME COURT in *McDonald v. Santa Fe Trail Transportation Co.*[1] held that Title VII[2] prohibits racial discrimination by both employers and unions against white persons upon the same standards as it prohibits racial discrimination against nonwhites. The Court further held that Section 1981[3] is applicable to racial discrimination in private employment against white persons as well as nonwhites.

In *McDonald*, petitioners, two white employees of respondent trans-

[1] 96 S.Ct. 2574 (1976).

[2] 42 U.S.C. §2000e-2 (1970), provides in part that:
(a) It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.
(c) It shall be an unlawful employment practice for a labor organization . . . to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

[3] Civil Rights Acts, 42 U.S.C. §1981 (1970), provides:
All persons within the jurisdiction of the United States *shall have the same right* in every State and Territory *to make and enforce contracts,* to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property *as is enjoyed by white citizens,* and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other. (emphasis added.)